



DEFENCE FOI 175/24/25, 184/24/25, 216/24/25

STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT 1982

1. I refer to requests by [REDACTED] (the applicant), for access to specific documents that explain the Australian Defence Force's effort to recruit foreign nationals under the *Freedom of Information Act 1982* (Cth) (FOI Act).
2. On 3 September 2024, the applicant submitted a request under the FOI Act to the Department of Defence (Defence) in the following terms:

Specifically, I am seeking:

- *Labor Party talking points provided to Defence Minister Richard Marles ahead of the announcement on Tuesday 4 June 2024*
- *Labor Party talking points provided to Defence Personnel Minister Matt Keogh ahead of the announcement on Tuesday 4 June 2024*
- *Briefing notes from the Department of Defence to Defence Minister Richard Marles related to the announcement on Tuesday 4 June 2024*
- *Labor Party and Department of Defence briefing notes given to Defence Minister Richard Marles ahead of Question Time on Tuesday 4 June 2024*
- *Correspondence between staff at Mr Marles and Mr Keogh's office on Monday 3 June – Wednesday 5 June 2024*
- *Correspondence sent to the Herald Sun's Mark Dunn ahead of the announcement on Tuesday 4 June 2024.*





FOI decision maker

9. I am the authorised officer pursuant to section 23 of the FOI Act to make a decision on the FOI requests.

Documents identified

10. I have identified four (4) documents as falling within the scope of the requests.
11. The decision in relation to each document is detailed in the schedule of documents.

Exclusions

12. Mobile telephone numbers contained in documents that fall within the scope of the FOI request, duplicates of documents are excluded from this request. Defence has only considered final versions of documents.

Decision

13. I have decided to:
 - a. partially release 4 documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act on the grounds that the deleted material is considered exempt under sections 33 [Documents affecting national security, defence or international relations], 42 [Documents subject to legal professional privilege], 47C [Public interest conditional

exemptions - deliberative processes], 47E [Public interest conditional exemptions – certain operations of agencies] and 47G [Public interest conditional exemptions – business] of the FOI Act;

- b. refuse items of the requests seeking access to ‘*Labor Party*’ material under section 24A [requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act; and
- c. remove irrelevant material in accordance with section 22 of the FOI Act.

Material taken into account

- 14. In making my decision, I have had regard to:
 - a. the terms of the requests;
 - b. the content of the identified documents in issue;
 - c. relevant provisions of the FOI Act;
 - d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
 - e. advice received from a third party.

REASONS FOR DECISION

Section 22 – Access to edited copies with exempt or irrelevant matter deleted

- 15. Section 22 of the FOI Act permits an agency to prepare and provide an edited copy of a document where the agency has decided to refuse access to an exempt document or that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access.
- 16. The documents identified in the schedule of documents as being released in part contain exempt and irrelevant material such as mobile telephone numbers that do not relate to the requests.
- 17. I am satisfied that it is reasonably practicable to remove the exempt and irrelevant material and release the documents to you in an edited form.

Section 24A – Requests may be refused if documents cannot be found, do not exist or have not been received

- 18. Section 24A(1) of the FOI Act states:
 - (1) *An agency or Minister may refuse a request for access to a document if:*
 - (a) *all reasonable steps have been taken to find the document; and*
 - (b) *the agency or Minister is satisfied that the document:*
 - (i) *is in the agency’s or Minister’s possession but cannot be found; or*
 - (ii) *does not exist.*
- 19. Paragraph 3.94 of the Guidelines advises the detail this statement of reasons should include to refuse a request under section 24A(1):

...the statement of reasons given to the applicant should sufficiently identify the document, explain why it cannot be found or is known not to exist or to be in the agency's possession, describe the steps the agency took to search for the document, and note the limitations of any search...

20. As part of your FOI requests, you have sought access to 'Labor Party talking points' and 'Labor Party briefing notes'. I am satisfied that the Department does not create, transmit or hold party-political documents. Further, under the FOI Act, you cannot access documents held by a minister that do not relate to the affairs of an agency. Section 4 of the FOI Act clarifies that an exempt document includes a document of a Minister that contains some matter that does not relate to the affairs of an agency, including documents of a party political nature.
21. I am satisfied that all reasonable steps have been taken to locate the documents sought by the applicant, and I am satisfied that the documents do not exist, and refuse the request under section 24A(1) of the FOI Act.

Section 33(a) – Documents affecting national security, defence or international relations

22. Section 33(a) of the FOI Act states:

A document is an exempt document if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to*
 - (ii) the defence of the Commonwealth*
 - (iii) the international relations of the Commonwealth*

23. In regard to the terms 'would, or could reasonably be expected to' and 'damage', the Guidelines provide:

5.16 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.

5.17 The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.

...

5.32 The meaning of 'damage' has three aspects:

- i. that of safety, protection or defence from something that is regarded as a danger. The AAT has given financial difficulty, attack, theft and political or military takeover as examples.*
- ii. the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage.*
- iii. the organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect.*

24. In regard to ‘defence of the Commonwealth’, the Guidelines provide at paragraph 5.36:

The FOI Act does not define ‘defence of the Commonwealth’. Previous AAT decisions indicate that the term includes:

...enduring the proper conduct of international defence relations

...protecting the Defence Force from hindrance or activities that would prejudice its effectiveness.

25. The documents relevant to the request relate to the government’s decision to expand eligibility criteria to allow non-citizens from partner countries to join the Australian Defence Force.
26. In April 2024 the Albanese Government released the National Defence Strategy; the blueprint for delivery of an ambitious transformation to ensure the Australian Defence Force is positioned to safeguard Australia’s security, and contribute to regional peace and prosperity. This includes a requirement to recruit, retain and grow a highly specialised and skilled Defence workforce.
27. I am satisfied that the information exempted under section 33(a)(ii) of the FOI Act directly relates to the ability of the Defence Force to achieve its objectives and capabilities, which as noted above relies on sustainable and effective recruitment and retention strategies.
28. In regard to ‘international relations’, the Guidelines provide at paragraph 5.39:
- The phrase ‘international relations’ has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them. The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.*
29. I find that disclosure of the information exempted under section 33(a)(iii) of the FOI Act would cause, or could reasonably be expected to cause, damage to the international relations of the Commonwealth given the deliberative nature of the information contained within the documents; and that the release of this information could reasonably and adversely impede the good working relations between Australia and the Governments of other nations, or the flow of confidential information between them.
30. Accordingly, I am satisfied that the information is exempt under sections 33(a)(ii) and 33(a)(iii) of the FOI Act.

Section 42 – Documents subject to legal professional privilege

31. Section 42(1) of the FOI Act states:

A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

32. I find that one document contains legal advice, which would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP).

33. The Guidelines provide, at paragraph 5.149, that in considering whether LPP exists, the following factors should be considered:

- *whether there is a legal adviser-client relationship*
- *whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation*
- *whether the advice given is independent*
- *whether the advice given is confidential*

34. I am satisfied that the legal adviser-client relationship had been established, as the advice was provided by lawyers, who were acting in their capacity as independent professional advisers.

35. I am satisfied that the specific material contained in the documents was created for the dominant purpose of giving or receiving legal advice, and that advice was provided independently. I also note there is no evidence to suggest that privilege has been waived by the client or the legal adviser.

36. Finally, I am satisfied the advice was provided in confidence given the disseminating legal marker attached to the documents. Further, I note that while the material in question is contained in documents being disclosed to more than one person in Defence, I have considered that this is to be expected due to the nature of the work undertaken. This matter of disclosure within an organisation is discussed at paragraph 5.174 of the Guidelines, which provides that ‘[m]odern organisations often work in teams and several people may need to know about privileged communications...’.

37. Accordingly, I am satisfied that the information is exempt under section 42 of the FOI Act.

Section 47C – Public interest conditional exemptions - deliberative processes

38. Section 47C(1) of the FOI Act states:

*(1) A document is conditionally exempt if its disclosure under this Act would disclose matter (**deliberative matter**) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:*

- (a) an agency; or*
- (b) a Minister; or*

(c) *the Government of the Commonwealth.*

39. In regards to ‘deliberative processes’, the Guidelines provide at paragraph 6.54:

A deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one’s course of action. In short, the deliberative processes involved in the functions of the agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

40. In making my assessment, I have also considered paragraph 6.59 of the Guidelines, which state:

There is no reason generally to limit the ordinary meanings given to the words ‘opinion, advice or recommendation, consultation or deliberation’.

41. I am satisfied that the identified material relates to opinion, advice or recommendation prepared to support deliberations on, and a course of action regarding Defence Force recruitment policy design, announcement and implementation. Further, I consider that disclosure of the identified material would, or could reasonably be expected harm future deliberative processes of the agency by exposing opinion, advice, or recommendations subject to future consideration.

42. In regards to ‘functions of an agency’, the Guidelines provide at paragraph 6.56:

The functions of an agency are usually found in the Administrative Arrangements Order or the instrument or Act that established the agency. For the purposes of the FOI Act, the functions include both policy making and the processes undertaken in administering or implementing a policy.

43. The Administrative Arrangements Orders provide broadly that the matters dealt with by the Department are Defence of the Commonwealth, including international defence relations, and defence co-operation. Further, the *Defence Act 1903* provides that the Secretary [of the Department of Defence] and the Chief of the Defence Force have joint administration of the Defence force. I am therefore satisfied that deliberative matter is directly linked to the functions of the agency.

44. Section 47C(2)(b) of the FOI Act provides that deliberative matter does not include purely factual material. The Guidelines, at paragraph 6.73, state that:

[p]urely factual material’ does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.

45. Accordingly, I am satisfied that the information contains matter that meets the definition of deliberative material, and that where the content is purely factual, it is embedded in, or intertwined with the deliberative content and cannot be excised.

Therefore, I have decided that the relevant information is conditionally exempt under section 47C of the FOI Act.

Section 47E – Public interest conditional exemptions – certain operations of agencies

46. Section 47E(d) of the FOI Act states:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

(d) have a substantial adverse effect on the proper and efficient conduct of the operations of the agency.

47. The Guidelines, at paragraph 6.115, provide that:

The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its operations in an expected manner.

48. In the case of 'ABK' and Commonwealth Ombudsman [2022] AICmr 44, the Information Commissioner (IC) found that where the direct email addresses and phone numbers of agency staff are not publicly known, they should be conditionally exempt under section 47E(d). The IC made this determination due to reasonable expectation that the release of direct contact details would undermine the operation of established channels of communication with the public. Further, the IC accepted that staff who were contacted directly could be subject to excessive and abusive communications, which may give rise to work health and safety concerns.

49. I am satisfied that were the contact details of Defence personnel made publicly available, it would have substantial adverse effects on the proper and efficient operation of existing public communication channels. Further, I am satisfied of a reasonable expectation that the information could be used inappropriately, in a manner which adversely affects the health, wellbeing and work of Defence personnel. Disclosure of names, email addresses and phone numbers could, therefore, reasonably be expected to prejudice the operations of Defence.

50. The Guidelines provide, at paragraph 6.112, that I should consider whether disclosure of the information 'would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient.' Given that the direct contact details within the documents are not publicly available and that more appropriate communication channels are already available, I am satisfied that release of the information could reasonably be expected to lead to a change in Defence's processes that would not lead to any efficiencies.

51. Additionally, I have found that the documents contain information relating to the operational processes of Defence, particularly in relation to announcements made by government. In order to determine if the disclosure would, or could reasonably be expected to have a substantial, adverse effect on the proper and efficient conduct of the operations of Defence, I have also considered the functions of the relevant minister's office and the processes in place for preparing for an announcement.

52. I consider that the relevant information would, or could reasonably be expected to release information about the internal workings, which would damage the strategic

and operational efficiencies of Defence, impairing Defence's ability to carry out its functions effectively. Further, by revealing sensitive strategies or procedures, I am of the view that disclosure could compromise national security, thereby aiding adversaries in countering or disrupting the recruitment and retention efforts of the Australian Defence Force.

53. Accordingly, I am satisfied that all staff information contained within the documents is conditionally exempt under section 47E(d) of the FOI Act.

Section 47G – Public interest conditional exemptions – business

54. Section 47G(1)(a) of the FOI Act states:

(1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

(a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.

55. I note that the use of the word 'could' in this provision requires only reasonable consideration of the possibility that disclosure may cause the consequences specified.

56. The Guidelines explain, at paragraph 6.185:

The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect....These considerations require a weighing of a public interest against a private interest - preserving the profitability of a business. However, at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.

57. The Guidelines also state, at paragraph 6.181:

The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. Nevertheless, the information in question must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking (s 47G(1)(a)).

58. The Guidelines go on to provide, at paragraph 6.191, '[t]he term 'business affairs' has been interpreted to mean 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'.

59. The document contains sensitive information about the business affairs of a third party. It is reasonable to expect that the release of this information would unreasonably affect their business by providing the direct contact details of company employees that are not already in the public domain.

60. Accordingly, I am satisfied that the information is conditionally exempt under section 47G(1)(a) of the FOI Act.

Public interest considerations – sections 47C, 47E and 47G

61. Section 11A(5) of the FOI Act states:

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

62. I have considered the factors favouring disclosure as set out in section 11B(3) [factors favouring access] of the FOI Act. The relevant factors being whether access to the document would:

(a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);

(b) inform debate on a matter of public importance;

(c) promote effective oversight of public expenditure.

63. In my view, disclosure of this information would not increase public participation in the Defence process (section 3(2)(a) of the FOI Act), nor would it increase scrutiny or discussion of Defence activities (section 3(2)(b) of the FOI Act).

64. Paragraph 6.233 of the Guidelines specifies a non-exhaustive list of public interest factors against disclosure. The factors I find particularly relevant to these requests are that release of this information could reasonably be expected to prejudice:

- the protection of an individual's right to privacy;
- the interests of an individual or a group of individuals; and
- the personnel management function of an agency.



65. It is in the public interest that Defence efficiently and productively operates with regard for the health and wellbeing of its personnel. As I have established above, the release of the names, email addresses and phone numbers of Defence personnel can reasonably be expected to prejudice the management and personnel management functions of Defence. Existing communication channels and processes enable efficient and appropriate liaison with the public. The direct contact details of Defence personnel should, therefore, not be disclosed, as the public interest against their disclosure outweighs the public interest in their release.


66. Additionally, while I accept there is a public interest in ensuring that Defence undertakes its functions in a transparent and proper manner, there is also a strong public interest in maintaining the confidentiality of the material contained within the document.

67. I am satisfied, based on the above particulars, the public interest factors against disclosure outweigh the factors for disclosure, and that, on balance, it is against the

public interest to release the information to you. Accordingly, I find that the information is exempt under sections 47C, 47E and 47G of the FOI Act.

68. I have not taken any of the factors listed in section 11B(4) [irrelevant factors] of the FOI Act into account when making this decision.

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Accredited Decision Maker
Defence People Group
Department of Defence